Supreme Court, U.S.
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No. 91-1813

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R. Ernest COHN, D.C., D.A.B.C.O.,
Petitioner,

v.

John L. BOND, M.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, AMERICAN CHIROPRACTIC ASSOCIATION

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OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, AMERICAN CHIROPRACTIC ASSOCIATION

Respondents respectfully submit that the Motion for Leave to File Brief of *Amicus Curiae*, American Chiropractic Association should be denied.

SUMMARY OF ARGUMENT

American Chiropractic Association ("ACA") failed to comply with the Rule 37 requirement that parties seeking to file an *amicus curiae* brief indicate any party who has refused consent to the filing. Respondents note that they did refuse consent to the filing of a brief by ACA. Such consent was refused because ACA does not possess facts or information that would help the Court resolve this matter. The proposed *amicus curiae* brief would not bring relevant matter to the Court's attention, and therefore the Motion for Leave to File should be denied.

ARGUMENT

THE PROPOSED BRIEF OF ACA DOES NOT BRING RELEVANT MATTER TO THE ATTENTION OF THE COURT

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming an order of the United States District Court for the Western District of North Carolina granting summary judgment for respondents. The courts found that the hospital privilege decision that petitioner challenges is immune from federal antitrust scrutiny under the Local Governments

Antitrust Act, 15 U.S.C. § 84 *et seq.* (1985) ("LGAA") and the State Action doctrine. Petitioner argues that the district court and Fourth Circuit misinterpreted North Carolina law when they did not carve out an exception for *chiropractors* to the general rule in North Carolina that hospital privilege decisions must be made by hospital boards of trustees and must be based upon both the qualifications of the applicant and the needs of the hospital. Petitioner argues that it was error for the courts below to fail to construe North Carolina "freedom of choice" and chiropractic access statutes as *requiring* that hospitals grant privileges to chiropractors. Petitioner's position is that while North Carolina grants hospitals discretion to deny hospital privileges to *physicians* (when their qualifications or the needs of the hospitals so indicate), there is no such discretion when chiropractors apply for privileges. Thus, according to petitioner it is illegal in North Carolina to deny hospital privileges to a chiropractor. (Pet. 15) Petitioner argues that State Action cannot immunize illegal acts, and therefore it was error for the lower courts to find State Action immunity in this case.

ACA seeks to bring to this Court's attention information about (1) the importance of chiropractic services (Brief of *Amicus Curiae* ("Br.") 1-3); (2) assertions about the

anticompetitive nature of accreditation standards of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") (Br. 3-8); (3) ACA's views on interpretation of North Carolina law (Br. 9-10); and (4) the views of ACA on conspiracy issues involving hospitals (Br. 11-15). None of the information proffered is relevant new information that would aid in consideration of the petition for writ of certiorari.

None of the information proffered by ACA in the first category concerning the importance of chiropractic services or the purported superiority of such services over physician services is relevant to whether State Action protects the hospital privilege decision being challenged in this case. The second category of information proffered by ACA, argument about the anticompetitive nature of accreditation standards of JCAHO and the importance of JCAHO accreditation to hospitals, is also irrelevant. Neither the JCAHO nor any of its sponsor organizations is a party to this lawsuit. Furthermore, the evil that ACA perceives with respect to JCAHO activities is expressly not relevant to this case. ACA argues that the JCAHO has encouraged physicians to obtain and maintain control of the credentialing process at hospitals and that physicians are likely to wish to exclude chiropractors from medical staffs. Any dangers there may be in hospital credentialing

systems where physicians control the process are irrelevant here. The record is without dispute that the Board of Trustees, *not* the physicians or medical staff, denied petitioner's hospital privileges (and that it did so after considering a number of relevant issues in addition to the recommendations of the medical staff committees required to comment on the application). (*See*, Complaint ¶ 17, Joint Appendix filed with Fourth Circuit ("JA") 18)[1]

The portion of the proposed *amicus curiae* brief that does deal with relevant subject matter, the proper interpretation of North Carolina law, does not bring any new information to the Court. ACA is a national organization that does not purport to have any insights concerning proper interpretation of North Carolina law, much less unique or different information warranting acceptance of an *amicus curiae* brief.

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[1] We note further that North Carolina's requirement that hospital privilege decisions at a public hospital be made by the hospital board of trustees, not the medical staff, has been in effect since 1925, long before the JCAHO activities alleged by ACA. *See*, Act to Amend Chapter 7272 of the Consolidated Statutes Relative to Public Hospitals, 1925 N.C. Sess. Laws c. 177 (current version at N.C. Gen. Stat. § 131E-85 (Supp. 1991))

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Finally, ACA seeks to draw the Court's attention to conspiracy issues relating to when, if ever, medical staff members can conspire among themselves and when, if ever, a medical staff can conspire with a hospital, issues not before this Court. The Fourth Circuit did not make any ruling concerning the capacity for conspiracy among medical staff members. The court's ruling related to a question of agency. The court held that when physician medical staff members make recommendations delegated to them by a hospital board of trustees, they do so as agents of the hospital. This ruling is not necessarily an intracorporate conspiracy issue and is applicable regardless of whether the "agent" whose acts are under scrutiny is otherwise related to the principal.[2] The conspiracy issues that ACA wishes the Court to address are not raised by this case.

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[2] Further, to the extent that the court's ruling can be seen as any type of conspiracy ruling, the relevant conspiracy issue relates to the potential for conspiracy between the medical staff or its members and the *hospital*, an issue the petitioner concedes is not before this Court. (Pet. 20 n.11)

CONCLUSION

For the reasons explained, the Motion for Leave to File Brief of *Amicus Curiae* should be denied.

Respectfully submitted,

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